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SUPREME COURT, U.S.

No. 80-5302

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

ORIGINAL COPY

WILLIAM HOWELL,

Appellant,

v.

COSHOCTON COUNTY CHILDREN'S SERVICES BOARD,

Appellee.

Memorandum in Opposition of Motion to Dismiss

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ARGUMENT

The Appellee Children's Services Board contends, in its Motion to Dismiss, that the judgment in question here rests on an adequate and independent state ground. Specifically they contend that §2151.04(a) of the Ohio Revised Code provides an independent state basis for the judgment. Accordingly, they argue that even if this Court should find for the Appellant, the result in this instance would not be substantially affected. As to this conclusion, the Appellant disagrees.

In order to give force to the Appellant's argument, resort must be had to the record in this case, and the application of §2151.04(a), Ohio Revised Code. The evidence adduced at the adjudicatory hearing was primarily concerned with the condition and environment of Mary Evelyn Howell. The Appellee's major witness, Dr. Susan Taub, testified that any change of surroundings would be disadvantageous to Mary Evelyn Howell (Tr. 73). She recommended that the present placement (foster parents) be continued. She admitted that she had not evaluated the possibility of a family placement for the child, since "whatever we do today, if we change it (the placement), we're going to be changing an

existing, stable situation." (Tr.78). An employee of Appellee stated at the hearing that the Appellee sought permanent custody of the child because of her behavior problems and because of her need for a stable environment (Tr.16). Appellee's employee, Mrs. German, also stated that the Appellant's mother (Mary Evelyn's grandmother), was not considered as a placement for Mary Evelyn, even though, Mrs. Bache has sought it, because of the child's behavioral problems (Tr.21). Finally, Appellee's witness, Ms. Carolyn Shimskey, a school psychologist, opined that any different placement, presumably even with the child's grandmother, would be likely to cause Mary Evelyn's condition to deteriorate (Tr.86-87).

In other respects, the record is also unequivocal. The Appellant's mother, Mrs. Blanche Bache, had repeatedly requested custody of Mary Evelyn (Tr. 99-100; 109-110). Furthermore, the guardian ad litem testified that Mrs. Bache's home was quite unobjectionable (Tr. 120-121). The trial court, however, refused to allow a psychological profile of Mrs. Bache, nor would it allow an investigation of her home (Tr.125). Appellant's counsel had sought these measures in order to establish that Mrs. Bache was a suitable placement for Mary Evelyn (it should be noted that independent expert testimony was unavailable to the Appellant due to his indigency). The Appellant's argument at the trial level was that the child was not "homeless or destitute" within the meaning of §2151.04(a) of the Ohio Revised Code.[1] On August 9, 1979, the trial court entered judgment, but the basis of the dependency finding was not entirely clear on the face of the entry (see Appellant's Brief, Appendix D[2]). Believing that the

[1] It should be noted that it was never contended at the hearing that Mary Evelyn was, without, proper support, primarily due to Appellant's disability pension.

courts judgment was contrary to Ohio Law, *see In re Darst*, 117 O. App. 374, 192 N.E. 2d, 287 (1961). *Cf. Moore v. City of E. Cleveland* U.S. (1977), (extending constitutional protection to the grandparent-grandchild relationship), the Appellant argued that whatever portion of the trial court's ruling was based on §2151.04(a), Ohio Revised Code was unsupported by the evidence, since no evidence was adduced which tended to show that Mrs. Bache was unfit to assume custody of Mary Evelyn. The Ohio Fifth District Court of Appeals rejected this argument saying that the record did not suggest that Mrs. Bache is "capable of providing adequate care for Mary Evelyn in view of the extensive testimony that she was ... a severely emotionally disturbed child and who, according to the expert testimony offered, still needs the continuing care of a stable family life (Appellant's Brief, Appendix B[3])(Emphasis Added). Aside from shifting the burden of proof from the Appellee to the Appellant, this opinion had the effect of allowing proof of the material elements of §2151.04(c) Ohio Revised Code to serve as the basis of a dependency finding under §2151.04(a), Ohio Revised Code. In other words, the Court of Appeals affirmed a finding under 2151.04(a) because the "condition" and "environment" of the child would "warrant" the result. In the eyes of the Appellant, then, the Court of Appeals "doubled" the constitutional infirmities present in the instant situation. Accordingly, in the Memorandum in Support of Jurisdiction filed with the Ohio Supreme Court, the Appellant argued that unless the Court of Appeals construction was corrected, then the "constitutionality of this section (2151.04[A], Ohio Revised Code) will be open to serious question" (see Appendix A attached herein). A similar argument was not made to this Court primarily because it was felt that any ruling by this Court in the Appellant's favor would abrogate the Court of Appeals' ruling.

Accordingly, the Appellant submits that §2151.04(a) of the Ohio Revised Code does not, as applied in this case, provide an adequate and independent state ground. As has been pointed out, §2151.04(a) supports the dependency finding only to the extent that the child is "destitute" due to her "condition" or "environment". Clearly, the same issue is squarely presented by both sections of the Ohio Revised Code. The question is whether or not the state may terminate the parent-child relationship when the condition or environment of the child would make it appear to be in the child's "best interests". Thus, if this Court should find the arguments made in Appellant's statement in Support of Jurisdiction (regarding §2151.04[c], Ohio Revised Code) persuasive, the construction placed upon §2151.04(a), Ohio Revised Code by the Ohio Court of Appeals would no longer be viable. This Court has stated that the rationale for the adequate and independent state grounds doctrine is that "[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). Conversely, if correction of the state court interpretation of the federal question would affect the judgment of the state court, then no independent and adequate state ground exists. Such is the case here. The Appellee contends that §2151.04(a) Ohio Revised Code provides an adequate and independent state

ground can exist where that state ground rests on a construction which infringes upon the very constitutional rights which presumably were to be vindicated upon appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Opposition of Motion to Dismiss was served upon the Appellant Coshocton County Children's Services Board by mailing a copy to Attorney David Hostetler, Assistant Prosecuting Attorney, 410 1/2 Main Street, Coshocton, Ohio 43812 and upon the Guardian Ad Litem Attorney Norman S. Davitt, 528 1/2 Main Street, Coshocton, Ohio 43812 by United States Regular Mail this 4th day of November, 1980.

Edward Emmett O'Farrell

Edward Emmett O'Farrell
Attorney for Appellant

APPENDIX A

IN THE SUPREME COURT OF OHIO

80-429

In the Matter of	:	Case No. _____
	:	
MARY EVELYN HOWELL	:	AN APPEAL FROM THE COSHOCTON
Alleged Dependent Child	:	COUNTY COURT OF APPEALS
	:	FIFTH APPELLATE DISTRICT
William Howell, Appellant	:	
	:	
	:	MEMORANDUM IN SUPPORT OF
	:	JURISDICTION

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FILED
MAR 25 1980
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

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PROPOSITION OF LAW NO. 1

Section 2151.04 (C), Ohio Revised Code is vague and overly broad and as a consequence is violative of a natural father's right of due process of law, in a dependency proceeding in Ohio, guaranteed by the provisions of the Constitution of the United States of America and the State of Ohio and the overruling by the trial court of a timely Motion to strike that count of the dependency complaint premised on this section of the Ohio Revised Code is reversible error.

Authorities 'cited' in support of Proposition of Law Number One:

Alsager v. Dist. Ct. of Pol'k Cty., 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on procedural grounds, 545 F. 2d 1137 (8th Cir. 1976)

In re B.G., 11 Cal 3d 679, 114 Cal Rptr. 444, 523 P. 2d 244 (1974)

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In re Carmaletta B. 579 P. 2d 514 (California 1978)

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Davis v. Page, 442 F. Supp. 258 (S.D. Florida 1977)

In re Douglas, 11 Ohio Op. 2d 340, 164 N.E. 2d 475 (1959)

PROPOSITION OF LAW NO. 1 CONTINUED:

Duchesne v. Sugarman, 566 F. 2d 817 (2nd Cir. 1977)

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Section 2151.04 (C), Ohio Revised Code.

PROPOSITION OF LAW NO. 2

The availability of suitable relatives at the time of the adjudicatory hearing in a dependency action in Ohio precludes the termination of parental rights and privileges, as a matter of law relative to the natural father of an alleged dependent child. A finding by the trial court that the alleged dependent child was "homeless or destitute or without proper care or support" as set forth in section 2151.04 (A), Ohio Revised Code is unwarranted and unsupported by any credible evidence, and is reversible error.

Authorities 'cited' in support of Proposition of Law Number Two:

In re Baby Girl S., 290 N.E. 2d 925, 926, 32 Ohio Misc. 217 (Stark Co. 1972)

In re Burkhardt, 239 N.E. 2d 772, 775 (1968)

In re Darst, 192 N.E. 2d 287, 291, 117 Ohio App. 374 (1963)

In re Fassinger, 334 N.E. 2d 5 at 8, 43 Ohio App. 2d 89 (Cuyahoga Co. 1974) aff'd by the Ohio Supreme Court, 42 Ohio St. 505, 330 N.E. 2d 431 (1975)

In re Kronjaeger, (1957), 166 Ohio St. 172, 140 N.E. 2d 773

In re Masters, 165 Ohio St. 503, 60 Ohio Op. 474 (1956)

In re Minton, 176 N.E. 2d 252, 256, 112 Ohio App. 361, 16 Ohio Op. 2d 283 (1960, constitutional law).

Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932 (1977), discussed at length infra p. 15

Section 2151.04, Ohio Revised Code
Section 2151.04 (A), Ohio Revised Code
Section 2151.23, Ohio Revised Code
Section 2151.353, Ohio Revised Code
Rule 7 (J) Ohio Rules of Juvenile Procedure
Rule 29 (F) Ohio Rules of Juvenile Procedure
Rule 32 (D) Ohio Rules of Juvenile Procedure

PROPOSITION OF LAW NO. 3

A Juvenile Court's refusal, upon timely Motion of a natural father of an alleged dependent child to continue a dispositional hearing in a dependency matter in order that home investigations might be conducted of relatives willing and able to care for an alleged dependent child and the court's further refusal to conduct physical and mental examinations of the natural father of an alleged dependent child as well as the relative, willing and able to care for the alleged dependent child controverts the stated and espoused goal of Ohio law to keep families together and by preventing a natural father of an alleged dependent child from rehabilitating himself in order to conform his conduct to the law's expectations renders this procedure unconstitutional and violates the natural father's rights of due process of law as provided for by the United States Constitution, Fourteenth Amendment thereto, and the Constitution of the State of Ohio.

Authorities 'cited' in support of Proposition of Law Number Three:

In re Cunningham, 59 Ohio St. 2d 100

United States Constitution, Fourteenth Amendment

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STATEMENT OF THE CASE

On April 23, 1979, the Executive Secretary of the Coshocton County Children's Services Board, Coshocton, Ohio, filed, a Complaint with the Court of Common Pleas, Juvenile Division, Coshocton County, Ohio, alleging that Mary Evelyn Howell, born September 23, 1971 was, a dependent child. The Complaint prayed for permanent custody of the child. This Complaint was filed subsequent to this Court's Judgment Entry and Memorandum Opinion of March 19, 1979 reversing the trial court's previous Judgment Entry of May 24, 1978 finding the child to be dependent and awarding permanent custody to the Children's Services Board.

Various motions were filed by Appellant during the pendency of this action and on August 2, 1979 the adjudicatory hearing was held before visiting Judge Holland Gary. A finding of dependency was made on that date and a dispositional hearing was held that date over the objection of counsel for the Appellant and Appellant's motion for home investigations and social histories pursuant to Rule 32 was overruled.

On August 9, 1979 the Court journalized its findings and orders of August 2, 1979.

On August 24, 1979 Appellant filed his Notice of Appeal in the trial court.

On January 3, 1980 oral argument was held before the Court

of Appeals for Coshocton County, Ohio in Canton, Ohio. On January 31, 1980 an Opinion and Judgment Entry was filed in Court of Appeals Case No. 79-CA-16, Fifth District Court of Appeals, Court of Appeals for Coshocton County, Ohio which Opinion and Judgment Entry affirmed the August 9, 1979 findings and orders of the Coshocton County Juvenile Court granting permanent care and custody of Mary Evelyn Howell to the Coshocton County Children's Services Board thereby divesting Appellant William Howell of all parental rights and duties relevant to his minor child.

Appellant filed his Notice of Appeal in the Fifth District Court of Appeals, Court of Appeals for Coshocton County, Ohio indicating that he was appealing this matter to the Supreme Court of Ohio with service of that Notice of Appeal being made upon all interested parties and/or their counsel.

STATEMENT OF FACTS

The factual narrative in this particular case is a complicated one. This matter comes to the Supreme Court of Ohio upon a Motion to Certify Record after lengthy proceedings in the Coshocton County Juvenile Court and the Court of Appeals for Coshocton County, Ohio.

Initially, on March 5, 1976 the Appellee Coshocton County Children's Services Board filed a Complaint with the Court of Common Pleas, Juvenile Division, Coshocton County, Ohio alleging that Mary Evelyn Howell, born September 23, 1971 was a dependent child. The Complainant - Appellee Children's Services Board prayed for temporary custody of the child. In February of that same year Mary Evelyn's mother was shot and killed by Appellant William Howell. In June of 1976 Appellant William Howell plead guilty to voluntary manslaughter and was sentenced to serve seven (7) to twenty five (25) years in a penal institution in the State of Ohio. Temporary custody of Mary Evelyn was granted pursuant to the request of the Appellee Children's Services Board and pending a hearing on the Complaint.

Mary Evelyn Howell remained in the temporary custody of the Appellee Children's Services Board and in the actual custody of Mary's foster families. Various proceedings were held in this matter and on May 5, 1978 an adjudicatory hearing was held in the Juvenile Court, Coshocton County, Ohio resulting in a May 24, 1978 Judgment Entry granting permanent custody of Mary Evelyn Howell to the Appellee Children's Services Board. An appeal was filed with the Court of Appeals for

Coshocton County, Ohio and on March 19, 1979 by Journal Entry and Opinion the Fifth District Court of Appeals, Court of Appeals for Coshocton County, Ohio reversed and remanded the case to the Juvenile Court of Coshocton County, Ohio.

On April 23, 1979 the Appellee Children's Services Board filed a new Complaint with the Court of Common Pleas, Juvenile Division, Coshocton County, Ohio alleging that Mary Evelyn Howell was a dependent child. The Complaint prayed for permanent custody of said minor. The adjudicatory hearing was held in this matter on August 2, 1979 before visiting Judge Holland Gary. The Court on August 2, 1979 found Mary Evelyn Howell to be a dependent child as defined in Section 2151.04, Ohio Revised Code and proceeded to a dispositional hearing on the same date. On August 9, 1979 the Court journalized its findings and orders of August 2, 1979 which was to award permanent custody of Mary Evelyn Howell to the Appellee Children's Services Board.

Appeal was made to the Court of Appeals for Coshocton County, Ohio, Fifth Appellate District, which Court on January 31, 1980 affirmed the Judgment Entry of August 9, 1979 of the Juvenile Court for Coshocton County, Ohio.

ARGUMENT

PROPOSITION OF LAW NUMBER ONE

SECTION 2151.04 (C), OHIO REVISED CODE IS VAGUE AND OVERLY BROAD AND AS A CONSEQUENCE IS VIOLATIVE OF A NATURAL FATHER'S RIGHT OF DUE PROCESS OF LAW, IN A DEPENDENCY PROCEEDING IN OHIO, GUARANTEED BY THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE STATE OF OHIO AND THE OVERRULING BY THE TRIAL COURT OF A TIMELY MOTION TO STRIKE THAT COUNT OF THE DEPENDENCY COMPLAINT PREMISED ON THIS SECTION OF THE OHIO REVISED CODE IS REVERSIBLE ERROR.

On June 13, 1979 Appellant filed in the trial court a Motion to Strike Count Two of the Complaint of April 23, 1979, which repeated verbatim, the language of Section 2151.04 (C), Ohio Revised Code. A written Memorandum of Law accompanied said Motion. On June 21, 1979 the trial court heard oral argument on this Motion and on July 5, 1979, by Judgment Entry the Court overruled that Motion. The Motion was renewed at trial on August 2, 1979 and overruled again. Appellant submits that the trial court erred in overruling the Motion and urges this position for the following reasons.

Count Two of the Complaint of April 23, 1979 (hereafter Complaint) is so overly broad, vague and nebulous that to deprive Appellant of the permanent custody, care and control of his minor child based on this portion of Ohio's dependency statute would be a gross violation of Appellant's property interest in his child and a denial of his rights of due process under the constitutions of the United States of America and the State of Ohio. The constitutionality of Ohio's Dependency statute (Section 2151.04, Ohio

Revised Code) has yet to be determined by this Court and Appellant firmly believes that such a determination is necessary and should be made in this case. The widespread impact on parents and children in Ohio by this Court making such a decision is immediately apparent.

Any analysis of Section 2151.04 (C), Ohio Revised Code must necessarily begin with an analysis of the various rights involved. Essentially the rights involved are those of the parents of alleged children and the rights of the children themselves. Appellant being a father of an alleged child believes the crucial consideration, from his perspective, must be phrased as follows: Is a parent's right to raise his child(ren) a fundamental, constitutionally protected right? This question has been considered by the United States Supreme Court on several occasions and the answer has been in the affirmative.

In Meyer v. Nebraska, 262 U.S. 390 (1923), the Supreme Court held that the right to raise one's family is an essential right of a parent (262 U.S. at p. 399), terming this right a "liberty" interest in a fourteenth amendment context. The Supreme Court's ruling in Meyer, supra, has been reaffirmed subsequently in Pierce v. Society of Sisters, 268 U.S. 510 (1925) and in Prince v. Massachussets, 321 U.S. 158 (1944).

Perhaps the most persuasive, and recent, treatment of this "liberty" interest of parents by the United States Supreme Court has come in the case of Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley the Court (in granting the father of an illegitimate child the right to custody) said:

> (T)he rights to conceive and to raise one's children have been deemed essential---basic civil rights of man. (405 U.S. at p. 351) (T)he interest of a parent in the companionship, care, custody and management of his or her child comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. (405 U.S. at p. 351)

Thus, it is unarguable that the United States Supreme Court has determined that parental rights of custody, care, love and affection of their children to be fundamental, liberty interests protected by the safeguards of the United States Constitution.

Since the Ohio Supreme Court has never ruled on the constitutionality of Ohio's Dependency statute, it is necessary to discuss other jurisdictions' treatment of similarly worded statutes and argue analogously to Section 2151.04 (C), Ohio Revised Code. Most of the courts which have considered the constitutionality, or lack thereof, of the dependency statutes of other jurisdictions, have considered the parent's right to raise his child to be a "fundamental right" and have applied the "strict scrutiny" analysis, the highest constitutional standard. See Alsager v. Dist. Ct. of Polk Cty., 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on procedural grounds, 545 F. 2d 1137 (8th Cir. 1976); Roe v. Conn., 417 F. Supp. 769 (M.D. Ala. 1976).

Duchesne v. Sugarman, 566 F. 2d 817 (2nd Cir. 1977); Davis v. Page, 442 F. Supp. 258 (S.D. Florida 1977); In re Carmaletta B., 579 P. 2d 514 (California 1978); In re B.G., 11 Cal. 3d 679, 114 Cal. Rptr. 444, 523 P. 2d 244 (1974); Bowers v. State, 283 Md. 115, 389 A. 2d 341 (Supreme Court of Maryland 1978); State V. McMaster, 259 Ore. 291, 486 P. 2d 567 (1971). It would seem apparent, then, in light of this overwhelming authority, that the strict scrutiny test and standard must be applied by this Court in considering whether or not Section 2151.04 (C), Ohio Revised Code passes constitutional muster.

Appellant's argument relative to the constitutionality of Ohio's Dependency statute is basically a treatment of the concepts of "vagueness" as a denial of "due process" and "substantive due process rights" as provided for in the United States and Ohio Constitutions.

I. "VAGUENESS" AS A DENIAL OF APPELLANT'S DUE PROCESS RIGHTS

The parental rights involved in a dependency proceeding have been determined to be "fundamental", thus requiring that the State's infringement upon these rights be accorded a "strict scrutiny" analysis (see Alsager, and other cases cited supra). In the context of "void for vagueness", this means that the standards announced by the United States Supreme Court in Grayned v. City of Rockford, 408 U.S. 104 (1972) are applicable. These standards have consistently been applied in cases dealing with the vagueness of

neglect and dependency statutes of other states. See Alsager, supra; Roe, supra, In re D.L.H., 198 Neb. 444, 253 N.W. 2d 283 (1977); Matter of Keyes, 574 P. 2d 1026 (Okla. 1978); Bowers v. State, supra; In re William L., 477 Pa. 332, 383 A. 2d 1228 (1978), cert. denied, 58 L.E. 2d 693; In Interest of Hockmuth, 25 N.W. 2d 484 (Iowa 1977); People v. Schoas, 15 Ill. App. 3d 964, 305 N.E. 2d 560 (1973), app. denied, S. Ct. of Ill. (unreported), app. dismissed, 417 U.S. 963.

The Alsager Court, supra, in applying the standards set forth in Grayned, supra, said at page 17:

> 1) The statute (Iowa) as interpreted by a man of average intelligence, must give notice as to what is prohibited, so that the parents may conform their conduct to the law.
>
> 2) The statute must not be an improper delegation of policy making power so as to allow selective or arbitrary enforcement (emphasis added).
>
> 3) The statute's vagueness should not give rise to uncertainty, which would have a chilling effect on the parents' conduct...

Courts addressing this "notice" requirement have split in their decisions in a rather consistent manner. State statutes which do not have a "built in" period between adjudication and disposition, during which period parents have the opportunity to modify their conduct according to specific orders of the trial court have been held to be unconstitutionally vague. (See Alsager, supra, and Roe, supra.) Those state statutes which give the parent an opportunity to modify his or her conduct to a court-ordered standard prior to disposition, have been upheld as constitutional.

It is interesting to note that the Iowa statute, struck down in Alsager, supra, as being both vague and a denial of substantive due process was subsequently upheld in both In Interest of Hockmuth, supra and Crooks v. McNeely, 262 N.W. 2d 786 (1978). In the latter two cases, the Iowa Supreme Court held that since the parents were given an opportunity to meet certain court-ordered standards, the statute was constitutional as applied. The parents in Alsager, supra (see note 12, p. 20) were not given this opportunity.

Secondarily, in arguing that Ohio's statute is unconstitutionally vague and overly broad, Appellant submits that the statute in Ohio, is arbitrarily enforced. The vagueness of Ohio's statute breeds inconsistent, and, thus, unconstitutional application. This statute, in effect, allows arbitrary and selective enforcement of Ohio's Dependency statute by low level county standards of what "conditions warrant the state in assuming guardianship".

A classic example of a vague dependency statute capable of selective enforcement is found in Roe v. Conn., supra, in which the trial judge made a finding of dependency when the only facts made known to him were that the child and mother (white) were both living with a black man.

That the lack of any ascertainable standards (vis a vis dependency) could lead to arbitrary enforcement of Ohio's Dependency statute becomes even more apparent, especially when the statute does not require injury to the child (i.e. termination need only be in the "best interest" of the child). The lack of any ascertainable

standards necessarily makes any decision by a judge (at either the trial or appellate level) both subjective and discretionary. Furthermore, appellate review would seem unlikely to narrow the discretion granted to the trial court since the appellate judges are unlikely and unwilling to substitute their subjective judgment for that of the trial court's since the trial court had face to face contact with all parties involved, etc.

The institution in Ohio, then, of a procedure, in the dependency context, in which the trial court must set specific standards which the parents of children could attempt to meet and fulfill would serve two purposes. First of all, it would give parents notice as to what sort of conduct the law expects of them as it relates to their children. Secondly, the standards set by the trial court would give an appellate, or review, body objectively ascertainable standards upon which the higher court could evaluate the decision of the trial court to sever the parent-child relationship.

II. SECTION 2151.04 (C), OHIO REVISED CODE DENIES SUBSTANTIVE DUE PROCESS TO PARENTS OF ALLEGED DEPENDENT CHILDREN

Appellant in his argument, supra, has submitted that a fundamental right is at issue in a dependency proceeding when the possibility of permanent divestiture of parental rights is a possible consequence of the proceedings. Thus, a "strict scrutiny" analysis is appropriate. The primary concern, then, of the court, must be to determine what is the appropriate test under these circumstances.

The appropriate standard or test is, according to the overwhelming weight of authority (see Alsager, supra at p. 21; Roe, supra; In re Carmaletta B., supra; State v. McMaster, supra) that where certain fundamental rights are involved, the courts have held that regulation limiting these rights may be justified only by a "compelling state interest", and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake. See Roe v. Wade, 410 U.S. 113 (1973) at p. 155.

The key to this Court's consideration then is whether or not Section 2151.04 (C) is drawn narrowly enough so that the State's infringement occurs only when it has a compelling interest at stake.

The obvious question, then, is what constitutes a "compelling state interest" in Ohio's dependency context. It is agreed that a finding of a submarginal home or that a child is culturally deprived is not sufficient to give rise to a compelling state interest in divestiture from parents of their children. See In re William L., 383 A. 2d at p. 1233 (S. Ct. of Pa. 1978), cert. denied 58 L.E. 2d 693. It appears that the State's interest, in dependency proceedings, is only compelling upon a showing of injury to the child or a high probability of future injury. See Alsager, supra; Roe, supra; In re William L., supra; State v. McMaster, supra; In re B.G., supra; and In re Terry D.,148 Cal Rptr. 221, 83 Cal. App. 3d 890.

It seems logical, then, in light of this standard that the harm suffered by the child must be irremedial in nature in order to justify termination as opposed to temporary custody and ultimate return to the parents.

The final consideration in terms of analyzing a "compelling state interest" in this context is to address the nature of the injury to the child. This is generally a matter of degree. The highest standard required was formulated in Alsager, supra at p. 21. This standard was verbalized as "a high and substantial degree of harm". This standard is particularly applicable where the child, as in this case, has been placed in the temporary custody of the State and thus removed from the threat of immediate danger.

California would allow removal of the child from his parents only if its return to the parents would be "detrimental" to the child. (This interpretation was upheld in In re B.G., supra).

Pennsylvania requires that removal occur only to avoid irreparable injury to the child (see In re William L., supra).

Oregon requires a clear showing of injury prior to termination of the parent-child relationship (see State v. McMasters, supra). It should be noted that all of these state standards have passed constitutional muster in treatment by the particular State's highest judicial body. In Alsager, supra, the minimal standard was announced and applied: the harm to the child that would be caused by returning him to his parents must be greater

than the harm caused to him (child) by termination in order for their to be a compelling state interest.

Consequently, Ohio cannot terminate a parent-child relationship unless it manifests and clearly demonstrates a compelling state interest in said termination. Ohio cannot, and has not in the case of this statute, possess a compelling interest unless there is evidence of present or future injury to the child and the wording of the statute states such. Ohio's statute, more particularly Section 2151.04 (C), Ohio Revised Code sweeps too broadly and is vague as it relates to a present or future injury to the child and allows termination of the parent-child relationship absent the showing of a compelling state interest. This denies substantive due process to Appellant William Howell and is unconstitutional.

In conclusion, Appellant urges this Court to hold the Ohio Dependency statute unconstitutional for vagueness and for denying, in its application to parents of children alleged to be dependent thereunder, substantive due process under the United States and Ohio Constitutions. Section 2151.04 (C) allows trial courts, in Ohio, to terminate parental rights if it is found that the child's environment is not in his or her "best interests" (see In re Douglas, 11 Ohio Op. 2d 340, 164 N.E. 2d 475 (1959)). This analysis is necessarily subjective, providing no standards in terms of appellate review and thus, sowing the seeds of inconsistent adjudication in similar fact situations.

Appellant argues that it is nearly impossible to find a statute drawn in any broader terms than Section 2151.04 (C), Ohio Revised Code. This subsection requires no finding of any sort of injury as a pre-condition to permanent divestiture of a child from his parent. This fatal deficiency in Ohio's Dependency statute suggests that there are many instances in Ohio in which no compelling state interest has been shown, yet termination of the parent-child relationship has been ordered and will continue to be ordered absent a substantive change in the statute. This is a clear violation of parents' due process rights.

Appellant urges this Court to certify the Record in this case for the reason that this important constitutional issue is in need of clarification by this Court.

ARGUMENT
PROPOSITION OF LAW

THE AVAILABILITY OF SUITABLE RELATIVES AT THE TIME OF THE ADJUDICATORY HEARING IN A DEPENDENCY ACTION IN OHIO PRECLUDES THE TERMINATION OF PARENTAL RIGHTS AND PRIVILEGES, AS A MATTER OF LAW RELATIVE TO THE NATURAL FATHER OF AN ALLEGED DEPENDENT CHILD. A FINDING BY THE TRIAL COURT THAT THE ALLEGED DEPENDENT CHILD WAS "HOMELESS OR DESTITUTE OR WITHOUT PROPER CARE OR SUPPORT" AS SET FORTH IN SECTION 2151.04 (A), OHIO REVISED CODE IS UNWARRANTED AND UNSUPPORTED BY ANY CREDIBLE EVIDENCE, AND IS REVERSIBLE ERROR.

Appellant urges this Court to adopt his second proposition of law.

It is clear from the Transcript of the proceedings in the trial court that the paternal grandmother, Blanche Bache, and the paternal stepfather, Harrison Bache could have and would have provided adequate, if not excellent, care for Mary Evelyn Howell. The Court below heard testimony from the grandmother concerning her willingness and ability to take Mary Evelyn into her home and provide love and care for Mary Evelyn during her minority until such time as the father was able to reassume his parental duties and responsibilities. There is not a shread of probative evidence which clearly and decisively shows that the paternal grandparents are incapable of caring for Mary Evelyn, regardless of her emotional state.

Appellant's mother and stepfather manifested a continuing interest and had frequent contacts with the child while Appellant,

the child's deceased mother and the child lived together after Appellant was incarcerated and while the child was in the Coshocton County Children's Services Board's custody. Said continuing interest and contact with the child were not more frequent due entirely to efforts clearly manifested by the Coshocton County Children's Services Board to abort any and all contact with Mary Evelyn by her father and the paternal grandparents.

It is incomprehensible that the State asserts that Appellant and his parents were not interested enough in the child when the State itself terminated, unilaterally, all contact by the Appellant and his family with the child. In any event, the manifested willingness of the Appellant and his mother and stepfather is an indication of the family's deep and continuing concern for the child.

The Court below erred in terminating Appellant's parental rights because at the hearing suitable family was available for the child. The Court failed to realize that under Ohio Case Law a finding of dependency cannot be made if the parent's own family can and will provide care. Secondly, the Court failed to properly and comprehensively evaluate the situation at the time of the hearing. Also it appears that the Court below failed to even seriously consider the grandparents of the Appellant as potential custodians for the child. Much of the thrust of public policy is embodied in Court decisions (see In re Darst, 132 N.E. 2d 287, 291

117 Ohio App. 374 (1963), discussed at length infra, p. 14; In re Minton, 176 N.E. 2d 252, 256, 112 Ohio App. 361, 16 Ohio Op. 2d 283 (1960)), constitutional law. See Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932 (1977), discussed at length infra p. 15; and the Juvenile Court's own rules, see Juvenile Rule 7 (J) providing for visitation by adult, non-parent relatives "of children in shelter care"; Juvenile Rule 32 (D) speaking of investigations of not just parents but "family relations" is for the Juvenile Court and Children's Services to look first to the child's relatives. Hardly can it be said that the Court or Coshocton County Children's Services Board gave a serious look to the Appellant's parents and family as persons who could care for the child until Appellant was able to resume his parental responsibilities and duties.

Appellant contends that since suitable family was available to care for the child, a finding of dependency is, by law, precluded. In re Darst, supra, stands clearly for the proposition that a court cannot make a dependency finding if relatives are able to care for the children. In that case, grandparents cared for three children for nearly a decade before the father returned to resume his parental responsibilities. The Court reversed the Juvenile Court's finding of dependency, holding:

> In a proceeding under Section 2151.04, Ohio Revised Code, the State of Ohio itself is asserting a right to the custody, care and control of a child as against the family. In communistic and totalitarian concepts of government and human rights, the state

> is paramount to the individua and may assert its interest as it sees fit. In our nation, and under Ohio law, the paramount interest in a child rests with the parents and the family. Id. at 289 (Emphasis added).

Because under Ohio law, "the State's interest...arises only if there is no one", the Darst court found "(t)he fact that relatives are (or as here, are able and desirous of) providing that care and support is immaterial to (i.e. will not support) the determination of dependency" Id. at 291. Two Ohio District Courts of Appeals cases also stand for the proposition that neither neglect nor dependency findings can be made when there have been or are other relatives (or friends) available to care for children during a period of time when the parent is indisposed. See In re Kronjaeger, 166 Ohio St. 172, 140 N.E. 2d 475 (1957); In re Masters, 165 Ohio St. 503, 60 Ohio Op. 474 (1956); In re Minton, supra; and In re Konneker, 30 Ohio App. 502 (Summit Co. 1929).

Unless this Court interprets the Dependency statute (Section 2151.04, Ohio Revised Code) to allow a permanent severing of all parental rights only when (unlike here) there are no relatives willing and able to care for the child, or children as the case may be, the constitutionality of this section will be open to serious question. In this respect, the words and holding of the Supreme Court of the United States in Moore, supra, are particularly enlightening and instructive. In Moore, supra, the Court invalidated an ordinance that forbade a grandmother to live with her two grand-

sons, who were cousins. As the effect of that ordinance was no different than that of the decision of the Court below. Appellant submits that the following is relevant, if not controlling:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a house along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most surely have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfaction of a common home. Decisions concerning child rearing, which Yoder, May, Pierce and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household — indeed who take on major responsibility for child rearing. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure homelife. This is apparently what happened here.
>
> Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State...the Constitution prevents East Cleveland from standardizing

> its children--and its adults--by forcing all to live in certain narrowly defined family patterns. Id. at 1938-1939. (Emphasis added).

The Court below erred in finding that a dependency situation occurred at the time of the hearing in this matter. The Court's determination of dependency must be made upon assessment of all of the facts at the time of the hearing, including availability of family to care for the child(ren).

Among the almost unbroken line of cases requiring such a determination is In re Minton, supra, at 256: "(T)his condition (neglect or dependency) must exist at the time of the hearing." (Emphasis added.) Indeed, in In re Darst, supra, at 290, the Court itself emphasized this key requirement, saying:

> The provision of this statute proscribes the extent of the Court's authority to remove the children and place them under the control of the state. Further, the determination that a child is "dependent" must be based on evidence as to conditions at the time of the hearing. In re Kronjaeger (1957), 166 Ohio St. 172, 140 N.E. 2d 773, paragraph two of the syllabus. (Emphasis in original).

See also In re Burkhardt, 239 N.E. 2d 772, 775 (1968):

> It is also equally clear and well established authority that whether the charge be neglect... or dependency...(the conditions) must exist as of the time of the hearing.

Simply stated it is the Appellant's position that Mary Evelyn Howell was not a dependent child at the time of the hearing be-

the paternal grandparents were, at that time, ready, willing, and able to provide adequate care for the child.

Appellant would be remiss not to point out that one court in Ohio, the Stark County Court of Common Pleas, has deviated from this "clear and well established authority". In In re Baby Girl S., 290 N.E. 2d 925, 926, 32 Ohio Misc. 217 (Stark Co. 1972), the Court said, without analysis, that:

> The issue of whether the child is a dependent child is to be determined as of "on or about the date specified in the complaint." (R.C. 2151.23). The amendment to the jurisdiction section to the Juvenile Code, effective November 1, 1969 repeals the judicial determination that the time of neglect or dependency must include the time of the hearing.

That Court erroneously confused the jurisdictional statute, Section 2151.23, Ohio Revised Code, with the definition of dependency statute, Section 2151.04, Ohio Revised Code. The former statute--not the latter--refers to "the date specified in the Complaint". Appellant is not disputing the trial court's jurisdiction for this reason (although he does for other reasons specified elsewhere in his brief) and nothing in the jurisdictional statute requires the Court below to ignore the reality of the evidence subsequent to filing the petition. Indeed, the Juvenile Rules, Rule 29 (F) specifically provides that after hearing:

> ...the court shall (1) if the allegations of the Complaint are admitted or proved:

> (d)dismiss the Complaint if such action is in the best interests of the child and the community.

In other words, the Juvenile Rules recognize that even if at the time of the filing of the Complaint the child was neglected or dependent, the Court still can and should "dismiss the complaint" if at the time of the hearing such a determination is no longer possible.

If the legislature had intended to change "the judicial determination that the time of neglect and dependency must include the time of hearing" it would not have said concerning disposition in Section 2151.353, Ohio Revised Code "(i)f the child is adjudged (a)...dependent child", but instead something different such as "if the child was adjudged a...dependent child based on the evidence at the time of the complaint". The continuing validity of the requirement that the evidence be evaluated "at the time of the hearing" is also clear from In re Fassinger, 334 N.E. 2d 5 at 8, 43 Ohio App. 2d 89 (Cuyahoga Co. 1974) aff'd by the Ohio Supreme Court, 42 Ohio St. 505, 330 N.E. 2d 431 (1975) where it was said:

> ...We interpret the law in Ohio to require a contemporaneous finding...that the children were neglected or dependent, before the Juvenile Court is authorized to wrench permanent custody from the natural parents. (Emphasis added).

The Fassinger Court went on to require that the relevant question "must be determined at the time of the hearing" citing In re Kronjaeger and In re Darst, supra.

Because Blanche and Harrison Bache, the child's paternal grandparents were, at the time of the hearing, ready, willing, and able to provide adequate care for Mary Evelyn, the Court below could not have found that Mary Evelyn, at the time of the adjudicatory hearing was "homeless or destitute or without proper care or support" and its order to the contrary, not based on any credible evidence of such homelessness or destitution is reversible error.

ARGUMENT
PROPOSITION OF LAW

A JUVENILE COURT'S REFUSAL, UPON TIMELY MOTION OF A NATURAL FATHER OF AN ALLEGED DEPENDENT CHILD TO CONTINUE A DISPOSITIONAL HEARING IN A DEPENDENCY MATTER IN ORDER THAT HOME INVESTIGATIONS MIGHT BE CONDUCTED OF RELATIVES WILLING AND ABLE TO CARE FOR AN ALLEGED DEPENDENT CHILD AND THE COURT'S FURTHER REFUSAL TO CONDUCT PHYSICAL AND MENTAL EXAMINATIONS OF THE NATURAL FATHER OF AN ALLEGED DEPENDENT CHILD AS WELL AS THE RELATIVE, WILLING AND ABLE TO CARE FOR THE ALLEGED DEPENDENT CHILD CONTROVERTS THE STATED AND ESPOUSED GOAL OF OHIO LAW TO KEEP FAMILIES TOGETHER AND BY PREVENTING A NATURAL FATHER OF AN ALLEGED DEPENDENT CHILD FROM REHABILITATING HIMSELF IN ORDER TO CONFORM HIS CONDUCT TO THE LAW'S EXPECTATIONS RENDERS THIS PROCEDURE UNCONSTITUTIONAL AND VIOLATES THE NATURAL FATHER'S RIGHTS OF DUE PROCESS OF LAW AS PROVIDED FOR BY THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT THERETO, AND THE CONSTITUTION OF THE STATE OF OHIO.

As argued, supra, Courts addressing this "notice requirement" have split in their decisions in a rather consistent manner. State statutes which do not have a "built in" period between adjudication and disposition, during which period parents have the opportunity to modify their conduct according to specific orders of the trial court have been held to be unconstitutionally vague. (See Alsager, supra, and Doe, supra). Those statutes which give the parent an opportunity to modify his or her conduct to a court ordered standard prior to disposition have been upheld as constitutional. The fact that the Juvenile Court refused and overruled Appellant's Motion for a continuance of the dispositional hearing made at the conclusion of the adjudicatory hearing renders this proceeding unconstitutional. The application of Ohio law in this

regard was improper. This is a classic case of the Court rushing to judgment without taking into account every conceivable and possible method of reuniting this family and keeping this family together.

Appellant's counsel moved this Court pursuant to Rule 32, Ohio Rules of Juvenile Procedure to postpone the dispositional hearing for a period of time sufficient to conduct physical and mental examinations of both the Appellant and his mother, a potential custodian of the child and to have social histories of each prepared for use by the Court at a dispositional hearing some time in the future. Appellant had been in a state penal institution for nearly four years and certainly the Court would not have compromised the minor child by continuing this matter for a short period to allow Appellant to conform his conduct to Court ordered directives. The Court summarily overruled Appellant's Motion and proceeded to disposition on the very same day as adjudication, without the benefit of investigations and social histories and without allowing Appellant to conform his conduct to Court ordered directives.

Appellant assigns reversible error to the Court's overruling of his Motion and refusal to consider potentially reliable and probative evidence at a later dispositional hearing. The Court of Appeals for Coshocton County, Ohio in its Opinion of January 31, 1980 affirming the trial court's actions in this regard found that Rule 32, Ohio Rules of Juvenile Procedure authorizing the ordering

of a social history or a physical or mental examination is discretionary with the Court. The Court of Appeals went on to find no abuse of discretion in this case. Appellant strongly disagrees. Testimony proffered to the Court and considered in an adjudicatory hearing is not proper evidence to be considered by the Court in a dispositional hearing without Appellant first having the benefit of time within which he is allowed to conform his conduct to Court ordered directives which can only come following an adjudicatory hearing. The trial court was not justified in concluding that no further inquiries would be beneficial relative to the best interests of Mary Evelyn Howell. Appellant concurs in the Court of Appeals finding that this Court in In Re Cunningham, 59 Ohio St. 2d 100, held that the primary inquiry at the dispositional phase of a dependency or neglect proceeding is the best interest and welfare of the child not the rights of the parents or the grandparents. Appellant contends that the best interests of Mary Evelyn Howell cannot be considered in a vacuum. Without a continuance of the dispositional hearing to allow the Appellant to conform his conduct to Court ordered standards any dispositional hearing held by the Court was contrary to Ohio law and as a result must be overturned. Additionally, Appellant submits that the refusal of the Court to continue the dispositional hearing is violative of his constitutional rights of due process as guaranteed to him by the United States Constitution and the Constitution of the State of Ohio.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that in addition to the constitutional violations as set forth supra, this matter is of public and great general concern in Ohio. Ohio's correctional facilities are populated with many parents of minor children. Is incarceration in a penal institution in Ohio of a natural parent sufficient to constitute a state of dependency *per se* relative to his minor child or children? Has Appellant as well as the alleged dependent child in this case, Mary Evelyn Howell, received their right to due process of law provided and guaranteed by the United States Constitution and the Constitution of the State of Ohio? Is the Ohio Dependency statute unconstitutionally vague and overly broad? Has this dependency statute if not vague or overly broad been constitutionally applied as it addresses Appellant William Howell?

This Court is urged to grant Appellant's Motion to certify the Record in this case in order that these very important questions relative to parents and children in Ohio are answered.

Consequently, Appellant respectfully submits that this case is a proper one for this Court to accept and he respectfully ruges this Court to grant his Motion to certify the Record.

Respectfully submitted,

Edward Emmett O'Farrell

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Support of Jurisdiction was served upon the Appellee Coshocton County Children's Services Board by mailing a copy to their attorney, David Hostetler, Home Savings & Loan Building, 401 1/2 Main Street, Coshocton, Ohio 44663 and Norman Davitt, Guardian Ad Litem for Mary Evelyn Howell, by mailing a copy to him at his law office at 528 1/2 Main Street, Coshocton, Ohio 43812, both by United States regular mail this 26th day of March, 1980.

Edward Emmett O'Farrell

Edward Emmett O'Farrell
Attorney for Appellant

IN THE COURT OF APPEALS

FIFTH APPELLATE DISTRICT

COSHOCTON COUNTY, OHIO

In the Matter Of	:	
MARY EVELYN HOWELL	:	Case No. 79-CA-16
Alleged Dependent Child	:	
William Howell, Appellant	:	NOTICE OF APPEAL

Appellant William Howell, by and through his attorney, respectfully enters his Notice of Appeal from the January 31, 1980 Judgment Entry of the Court of Appeals for Coshocton County, Ohio, Fifth Appellate District to the Supreme Court of Ohio. This case involves a substantial constitutional question.

Respectfully submitted,

Edward Emmett O'Farrell

Edward Emmett O'Farrell
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Attorney for Appellant William Howell

FILED
FEB 26 11 20 AM '80
CLERK OF COURTS
COSHOCTON CO., OHIO

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was served upon the Coshocton County Children's Services Board by mailing a copy to their attorney Assistant Prosecuting Attorney, David Hostetler, Home Savings & Loan Bldg., 401 1/2 Main Street, Coshocton, Ohio 43812 and mailing a copy to Attorney Norman Davitt, Guardian Ad Litem for Mary Evelyn Howell at 528 1/2 Main Street, Coshocton, Ohio 43812 this 28th day of February, 1980.

Edward Emmett O'Farrell
Edward Emmett O'Farrell
Attorney for Appellant William Howell

PROPOSITION OF LAW AND
ASSIGNMENT OF ERROR NO. 1

That Section 2151.04 (C), Ohio Revised Code is vague and overly broad and as a consequence is violative of Appellant's rights of substantive due process of law guaranteed by the Constitutions of Ohio and the United States and the trial court's refusal to grant Appellant's June 13, 1979 Motion to Strike filed in the action below is reversible error.

PROPOSITION OF LAW AND
ASSIGNMENT OF ERROR NO. 2

The trial court erred in finding Dependency and permanently divesting Appellant of his parental rights because, at the time, of the adjudicatory hearing, there was suitable family able and willing to care for the child who is the subject of the dependency complaint. The availability of suitable relatives at the time of the adjudicatory hearing precludes the termination of parental rights and privileges as a matter of law. A finding, then, that the child was "homeless or destitute or without proper care or support" as set forth in Section 2151.04 (A), Ohio Revised Code, is unwarranted and unsupported by any credible evidence, and is reversible error.

PROPOSITION OF LAW AND
ASSIGNMENT OF ERROR NO. 3

The trial court erred in failing to continue the adjudicatory hearing in order that the Appellant could be present at said hearing and/or erred in refusing to move the adjudicatory hearing to the correctional facility wherein Appellant was incarcerated at the time of the adjudicatory hearing. The State of Ohio cannot permanently divest Appellant of the custody, care, control and affection of his child without his presence at the adjudicatory and dispositional hearings when the reason for his absence is his incarceration by the State in a penal institution.

PROPOSITION OF LAW AND
ASSIGNMENT OF ERROR NO. 4

The trial court erred in refusing to grant Appellant's motion for a separate dispositional hearing as well as investigations of Appellant's mother's home and examinations, physical and mental, and social history of Appellant which are provided for by Rules 32 and 34, Ohio Rules of Juvenile Procedure.

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... J. ...
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COSHOCTON CO., OHIO

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
MARY EVELYN HOWELL, ALLEGED DEPENDENT CHILD,	:	JUDGMENT ENTRY
WILLIAM HOWELL,	:	CASE NO. 79-CA-16
APPELLANT	:	

For the reasons stated in the Memorandum-Opinion on file, all four assigned errors are overruled and the judgment of the Court of Common Pleas, Juvenile Division, of Coshocton County, Ohio, is affirmed.

David D. Dowd

Norman J. Putnam

Leland Rutherford

JUDGES.

FILED
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NADINE J. BUCKLEW
CLERK OF COURTS
COSHOCTON CO., OHIO
RECEIVED FEB. 5 1980

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:JUDGES:
	Hon. Norman J. Putman, P.J.
MARY EVELYN HOWELL,	Hon. Leland Rutherford, J.
ALLEGED DEPENDENT CHILD,	: Hon. David D. Dowd, Jr., J.
WILLIAM HOWELL,	: O P I N I O N
APPELLANT	: CAse No. 79-CA-16
	Decided: _____

APPEARANCES:

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ATTORENY FOR APPELLEE

DOWD, J.

This is an appeal from the judgment of the Juvenile Court of Coshocton County finding Mary Howell to be a dependent child and awarding permanent custody to the Coshocton County Children's Service Board.

The appeal is prosecuted by Mary's father who is presently serving a prison sentence of 7 to 25 years by virtue of his plea of guilty to the crime of voluntary manslaughter in the shooting death of Mary's mother in 1976. The initial complaint was filed thereafter. A previous adjudication and disposition was set aside by this Court in Case #78-CA-9 because, "the transcript of proceedings failed to disclose that the parent was advised that if permanent custody should be granted he would be divested of all parental rights. ....."

Another complaint was filed on April 23, 1979: alleging Mary Evelyn Howell to be a dependent child. A proper summons was issued and service had upon the appellant-father. After the father's motion for a continuance from a hearing scheduled for July 5, 1979, was sustained

and the hearing re-scheduled for August 2, 1979, an evidentiary hearing proceeded on August 2, 1979, during which hearing the court first adjudicated the issue of the child's dependency and therefore resolved the issue of disposition with the results previously described. The proof offered in support of the allegation of dependency was overwhelming. In 1976, after her mother's death, Mary Evelyn Howell was described as an emotionally disturbed child, unable to cope with children of her own age or to relate to adults. From the testimony, it is apparent that the child was vividly aware of the fact that her father had killed her mother.

We now consider the four assignments of error seriatim.

I

> "That Section 2151.04(C), Ohio Revised Code is vague and overly broad and as a consequence is violation of Appellant's rights of substantive due process of law quaranteed by the constitution of Ohio and the United States and the trial court's refusal to grant Appellant's June 13, 1979 Motion to Strike filed in the action below is reversible error."

R.C. 2151.04(C) provides:

> "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'dependent child' includes any child: ....(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship."

We hold that R.C. 2151.04(C) must be read in pari materia with the related sections of Chapter 2151 and, in particular, with R.C. 2151.27 which provides, in pertinent part, as follows:

> ".....complaint may be upon information and belief, and in addition to the allegation that the child is...dependent...the complaint must allegé the particular facts upon which the allegation of...dependency... is based."

R.C. 2151.27 is enforced by the Ohio Supreme Court's decision, *In Re Hunt, 26 Ohio St. 2d 378*, where the court stated in the first paragraph of its syllabus:

> "Complaint under Juvenile Rule 10 and R.C. 2151.27 alleging that a child is dependent must state the essential facts which bring the proceeding within the jurisdiction of the court."

Against such a background, we find the claim that R.C. 2151.04(C) is unconstitutional and overly broad is without merit. Appellant's reliance upon *Alsager v. District Court of Polk County, 406 F. Supp. 10,* is not well taken.

As indicated by appellee's brief, while the District Court in *Alsager* found the Iowa statute to be vague, the Court of Appeals in *Alsager v. District Court of Polk County, 545 F. 2d 1137,* chose not to affirm on the issue of vagueness. Rather, the Court of Appeals gave the Iowa court's, "an additional opportunity to give the statutory provisions a plainly desirable limiting instruction". From the decision it does not appear that Iowa has a statute similar to Ohio's Revised Code Section 2151.27 which requires a particular state of the facts where the condition of the pendency is alleged. As indicated by *In re Hockmuth, 251 NW 2d 484 (Iowa 1977),* a subsequent construction requiring that parents be specifically advised of the underlying facts in the complaint and given an opportunity to correct them, was utilized to salvage the constitutionality of the Iowa statute.

In sum, we conclude the first assignment of error is not well taken, and it is overruled.

II

"The trial court erred in finding dependency and permanently divesting Appellant of his parental rights because, at the time, of the adjudicatory hearing, there was suitable family able and willing to care for the child who is the subject of the dependency complaint. The availability of suitable relatives at the time of the adjudicatory hearing precludes the termination of parental rights and privileges as a matter of of law. A finding, then, that the child was 'homeless or destitute or without proper care or "support" as set forth in Section 2151.04(A), Ohio Revised Code, is unwarranted and unsupported by any credible evidence, and is reversible error."

The predicate for the second assignment of error is the claim that Blanch and Harrison Bache, the child's paternal grandparents, were, at the time of the hearing, ready, willing, and able to provide adequate care for Mary Evelyn, and, consequently, the court could not find properly that Mary Evelyn, at the time of the adjudicatory hearing, was "homeless or destitute or without proper care or support" and its order to the contrary, not based on any credible evidence or such homelessness or destitution is reversible error. Blanch Bache is the natural mother of Mary Evelyn Howell's father. Harrison Bache is the step-father of the appellant, and, thus, not related by blood to Mary Evelyn Howell. Blanch Bache is 65 years of age and has not cared

for children for 22 years. Harrison Bache, her husband, is 64 years of age. The record is devoid of evidence suggesting that the Baches, at their advanced age, are capable of providing adequate care for Mary Evelyn in view of the extensive testimony that she was at the time of the filing of the initial complaint in 1976, a severely emotionally disturbed child and who, according to the expert testimony offered, still needs the continuing care of a stable family life. Against such a background, the claim asserted in the second assignment of error has no foundation in fact. The second assignment of error is overruled.

III.

"The trial court erred in failing to continue the adjudicatory hearing in order that the Appellant could be present at said hearing and/or erred in refusing to move the adjudicatory hearing to the correctional facility wherein Appellant was incarcerated at the time of the adjudicatory hearing. The State of Ohio cannot permanently divest Appellant of the custody, care, control and affection of his child without his presence at the adjudicatory and dispositional hearings when the reason for his absence is his incarceration by the State in a penal institution."

As previously indicated, the original adjudicatory hearing scheduled for July 5, 1979, was continued on the appellant's motion until August 2, 1979. On the day scheduled for the hearing, counsel for the appellant appeared and asserted that he had been unsuccessful in his attempt to secure the presence of the appellant at the hearing. He asked for a continuance. The continuance was denied. However, the testimony offered by the appellant at the first adjudicatory hearing was presented and made a part of the record.

No attempt was made by counsel for the appellant to secure the assistance of the court with respect to the appearance of the appellant for the hearing. Rather, counsel for the appellant moved for a continuance, or, in the alternative, requested that the hearing be moved to the correctional facility where the appellant was incarcerated. The trial court overruled both motions. We find he did not error.

It is apparent that the appellant, through counsel, had ample time to invoke the appropriate procedure to insure his presence at the hearing, or, in the alternative, to request the assistance of the court in providing for such an appearance. Having failed to do that, the appellant cannot now be heard to complain about the fact that he was not present for the hearing.

In finding that the record does not support the claim that the state denied the appellant the right to be present at the hearing, we do not further address the claim prosecuted by the third assignment of error. It is overruled.

IV.

> "The trial court erred in refusing to grant Appellant's motion for a separate dispositional hearing as well as investigations of Appellant's mother's home and examinations, physical and mental, and social history of Appellant which are provided for by Rules 32 and 34, Ohio Rules of Juvenile Procedure."

The record reflects that a separate dispositional hearing was held following the adjudicatory hearing (R-114). Appellant did move the court to postpone the dispositional hearing in order that a social history of the appellant's mother and a physical and mental examination of the appellant pursuant to Rule 32 of the Juvenile Rules, might be obtained. The provisions in Ohio Juvenile Rule 32(A)(4) authorizing the ordering of a social history or a physical or mental examination

are discretionary with the court. In the case sub judice, we find no abuse of discretion. The court had already heard the testimony of Mrs. Bache concerning her home. Thereafter, Mr. Davit, Mary Evelyn Howell's guardian ad litem, was questioned with respect to Mrs. Bache's home. In addition, the court had the transcript of William Howell's prior testimony during which he conceded that he had been imprisoned in the past prior to the killing of Mary's mother, and had also been institutionalized in Cambridge State Hospital. Against such a background, as well as the overwhelming testimony describing the severe emotional disturbance of Mary Evelyn Howell, the court was justified in concluding that no further inquiries would be beneficial. However, as indicated in the recent decision of the Ohio Supreme Court in *In re Cunningham, 59 Ohio St. 2d 100*, the primary inquiry at the dispositional phase is the best interest and welfare of the child, not the rights of the parents or grandparents. The fourth assignment of error is without merit and is overruled.

Having overruled the four assignments of error, the judgment of the Juvenile Court of Coshocton County is affirmed.

Rutherford, J. and
Putman, P.J. concur.

JUDGES.

46

COSHOCTON COUNTY, OHIO

In the Matter of: :
Mary Evelyn Howell, :
a dependent child. :

CASE NO. 5957

JUDGMENT ENTRY

. . . . . .

This cause came on for adjudicatory hearing on August 2, 1979, upon the complaint of the Coshocton County Children Services Board alleging dependency pursuant to Sections 2151.04 (A) and 2151.04 (C), R. C., and requesting that the permanent care and custody of Mary Evelyn Howell be granted to the Coshocton County Children Services Board.

The court finds that notice of the hearing has been duly served.

The court having heard the evidence, and being fully advised in the premises, finds that Mary Evelyn Howell is a dependent child as alleged in said complaint.

The court, having heard further evidence as to the matter of disposition and further considering the testimony presented at the adjudicatory hearing relevant to disposition, hereby finds that an award of permanent custody to the Coshocton County Children Services Board is in the best interest of Mary Evelyn Howell. Accordingly, the Coshocton County Children Services Board is hereby granted permanent care and custody of Mary Evelyn Howell.

Holland M. Gary

Holland M. Gary, Judge

APPROVED:

David L. Hostetler

L. Hostetler, Attorney for
cton County Children Services Board

FILED

AUG 9 '79

RICHARD L. [illegible] CO. JUDGE
COSHOCTON [illegible] OHIO

Juv. 317

In the Court of Common Pleas, Juvenile Court Division Coshocton County, Ohio

COMPLAINT

(CHILD OR CHILDREN) Case No. 5957

Revised Code, Sec. 2151.27

Docket 125 Page 183

In the Matter of
MARY EVELYN HOWELL
c/o Children Services Board
Coshocton, Ohio
alleged (1) dependent *child*

-PERMANENT CUSTODY REQUEST-

The undersigned, after being duly sworn, according to law, says that she *has knowledge of* a *certain child*, *to-wit:*
MARY EVELYN HOWELL *age* 7 *years* D.O.B. September 23, 1971
who appears to be (1) a dependent *child*, *in that* on or about the 18th day of April, 1979 in the City and County of Coshocton, Ohio,

COUNT ONE: she is homeless, destitute and without any means of support, through no fault of her parents,

COUNT TWO: her condition and environment is such as to warrant the state, in the interests of the child, in assuming her guardianship,

"in that said child did not receive proper medical care; that the father is unable to properly care for this child due to his present physical condition and due to his present environment and circumstances; and generally that Mary Evelyn Howell is a severely emotionally damaged child who will require special care and nurturing and a stable environment, which this father is incapable of providing."

in violation of Section 2151.04 (A & C) of the Ohio Revised Code,

(1)

Complainant further says:
That said child now resides at c/o Children Services Board, Cosh. Ohio
That the names and addresses of the parents of said child are
William Howell - # 145-559 *residing at* Columbus Correctional Facility 254 W. Spring St., Columbus, Oh
Mary Evelyn Howell (mother) *residing at* deceased 2/16/76
That said child is (is – are) *currently in the care and custody of* (2) her father and Coshocton County Children Services Board by court order granting temporary care and custody on April 12, 1976
And that the following are facts concerning the present circumstances of the said child which the Court should have available for consideration.
Children Services Board are seeking PERMANENT care and custody of Mary Evelyn Howell. If the Coshocton County Children Services is granted the PERMANENT care and custody of the child the father will be permanently divested of all parental rights, privileges, and responsibilities with regard to the child.

Lowell Weiss, Ted Day
Coshocton County Children Services Board
318 Chestnut Street, Coshocton, Ohio
(Complainant's Address)

Sworn to before me and signed in my presence,
this 23rd *day of* April *19* 79.

Richard I. Evans
Judge

FILED
APR 23 '79
RICHARD I. EVANS, JUDGE
COSHOCTON, OHIO

By Matilda J. Porteus
Matilda J. Porteus, *Deputy Clerk*

1. "Delinquent," "Neglected," "Dependent," "Crippled," "Unruly"
2. If child is in care or custody of one or both parents, the complaint should so state. Otherwise, the name or names and addresses of the person or persons having custody should be given. The existence or non-existence of a legal guardian also should be stated here along with any needed names and addresses.

Section 2151.04 Dependent child defined

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "dependent child" includes any child:

(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian;

(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship.

Rule 32. Social history; physical examination; mental examination; custody investigation

(A) Social history and physical or mental examination: availability before adjudication. The court may order and utilize a social history or physical or mental examination at any time after the filing of a complaint:

(1) Upon the request of the party concerning whom the history or examination is to be made;

(2) Where transfer of a child for adult prosecution is an issue in the proceeding;

(3) Where a material allegation of a neglect, dependency, or abused child complaint relates to matters that such a history or examination may clarify;

(4) Where a party's legal responsibility for his acts or his competence to participate in the proceedings is an issue;

(5) Where a physical or mental examination is required to determine the need for emergency medical care under Rule 13; or

(6) Where authorized under Rule 7 (I).

(B) Limitations on preparation and use. Until there has been an admission or adjudication that the child who is the subject of the proceedings is a juvenile traffic offender, delinquent, unruly, neglected, dependent, or abused, no social history, physical examination or mental examination shall be ordered except as authorized under subdivision (A) and any social history, physical examination or mental examination ordered pursuant to subdivision (A) shall be utilized only for the limited purposes therein specified. The person preparing a social history or making a physical or mental examination shall not testify about the history or examination or information received in its preparation in any juvenile traffic offender, delinquency, or unruly child adjudicatory hearing, except as may be required in a hearing to determine whether a child should be transferred to an adult court for criminal prosecution.

(C) Availability of social or investigation report. A reasonable time before the dispositional hearing, or any other hearing at which a social history or physical or mental examination is to be utilized, counsel shall be permitted to inspect any social history or report of a mental or physical examination. The court may, for good cause shown, deny such inspection or limit its scope to specified portions of the history or report, in whole or part, not be disclosed to specified persons. If inspection or disclosure is denied or limited, the court shall state its reasons for such denial or limitation to counsel.

(D) Investigation: custody; habeas corpus. On the filing of a complaint for custody or for a writ of habeas corpus to determine the custody of a child, or on the filing of a motion for change of custody, the court may cause an investigation to be made as to the character, health, family relations, past conduct, present living conditions, earning ability and financial worth of the parties to the action. The report of such investigation shall be confidential, but shall be made available to the parties or their counsel upon written request not less than three days before hearing. The court may tax as costs all or any part of the expenses of each investigation.